INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Reasons for granting the writ	6
Conclusion	11

CITATIONS

Cases:	
Aeronautical Lodge v. *Campbell*, 337 U. S. 521	9
Dougherty v. *General Motors Corp.*, 176 F. 2d 561	9
Dwyer v. *Crosby Co.*, 167 F. 2d 567	9
Feore v. *North Shore Bus Co.*, 161 F. 2d 552	10
Fishgold v. *Sullivan Corp.*, 328 U. S. 275	9
MacLaughlin v. *Union Switch & Signal Co.*, 166 F. 2d 46	9
Mentzel v. *Diamond*, 167 F. 2d 299	6, 9
Oakley v. *Louisville & N. R. Co.*, 338 U. S. 278	6, 7, 8
Raulins v. *Memphis Union Station Co.*, 168 F. 2d 466	10
Seattle Star, Inc. v. *Randolph*, 168 F. 2d 274	10
Siaskiewicz v. *General Electric Co.*, 166 F. 2d 463	9
Trailmobile Co. v. *Whirls*, 331 U. S. 40	9
Statutes:	
Selective Service Act of 1948, 62 Stat. 604, Section 9	10
Selective Service Extension Act of 1950, P. L. 599, 81st Cong., 2d sess	10
Selective Training & Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. Appendix 308:	
Section 8 (a)	2
Section 8 (b)	3
Section 8 (b) (B)	3
Section 8 (c)	3, 10

903263—50

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 278

ROY BROWN, PETITIONER

v.

WATT CAR & WHEEL CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Roy Brown, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 1, 1950.

OPINIONS BELOW

The district court wrote no opinion (R. 17). The opinion of the Court of Appeals for the Sixth Circuit (R. 23) is reported at 182 F. 2d 570.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1950 (R. 23). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Under a collective bargaining agreement employees in continuous employment for one year received one week's vacation with pay and those in continuous employment for five years or more received two weeks' vacation with pay. If his period of military service were treated as continuous employment in the plant, the restored veteran would have been continuously employed for more than five years.

The question presented is whether Section 8 of the Selective Training and Service Act of 1940 requires service in the armed forces to be counted as service in the plant so that the restored veteran becomes entitled to two weeks' vacation with pay rather than one as held by the court below.

STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885) as amended (50 U. S. C. Appendix 308) provide as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be

discharged from such position without cause within one year after such restoration.

STATEMENT

This action was brought by a restored veteran to enforce rights to vacation with pay to which the veteran claimed to be entitled by virtue of a collective bargaining agreement under Section 8 of the Selective Training and Service Act of 1940 (R. 1–2). The case was tried upon an agreed statement of facts (R. 5–6), and both sides moved for judgment on the pleadings and the agreed statement of facts (R. 16–17). The district court rendered judgment against the veteran (R. 19–20), and the judgment dismissing the complaint was affirmed by the court below (R. 23).

The facts, as agreed upon, were as follows: Petitioner was a permanent employee of respondent from March 16, 1941, until December 9, 1942, when he was inducted into the United States Army (R. 5). He was honorably discharged on December 10, 1945, and was restored to respondent's employ on January 4, 1946 (R. 5). In 1945 a collective bargaining agreement was entered into with the International Association of Machinists under which respondent agreed "to grant a week's vacation with pay to each of its employees, who at the time of such vacation have been continuously in its employ for a period of one year" and "to grant two weeks' vacation

with pay to each of its employees, who at the time of such vacation have been continuously in its employ for a period of five years or more" (R. 6). Respondent has refused to credit restored veterans with time spent in military service in computing their periods of continuous employment for the purpose of determining whether they are entitled to one or two weeks' vacation (R. 6, 4). Accordingly, petitioner was granted one week's vacation in 1946 and 1947 (R. 6) instead of the two weeks to which he claimed to be entitled (R. 2). Nonveterans were not permitted to count time on furlough or leave of absence toward the continuous employment required for vacation pay (R. 6).

The district court dismissed the action on the ground that petitioner had failed to prove that the time of nonveteran employees on furlough or leave was counted in determining vacations due (R. 19). The court of appeals, although quoting the contract provisions making vacations depend solely on length of service (R. 24), held that "vacation with pay * * * is not an element of seniority" (R. 26). It held that "time spent in the [military] service" was not "to be treated as time in the continuous employ" of respondent in determining vacation rights, but that the veteran's rights were to be governed by the rights of nonveteran employees on furlough or leave of absence (R. 26).

REASONS FOR GRANTING THE WRIT

The effect of the decision below is to penalize the restored veteran with respect to vacation rights because of his service in the armed forces and to place him at a disadvantage compared with his fellow employees who were not called into military service and remained continuously on the job. The decision should be reviewed for the following reasons: (1) It fails to apply the interpretation of Section 8 of the Selective Training and Service Act clearly established by this Court, last term, in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, to the effect that time in military service must be counted as time on the job in determining various job rights based upon length of service, (2) it is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Mentzel* v. *Diamond*, 167 F. 2d 299, which dealt with the identical question of vacation pay in a similar factual situation, and (3) the statutory provision that the restored veteran "shall be considered as having been on furlough or leave of absence during his period of training and service" has created great confusion in the interpretation of veterans' reemployment rights. The need for clarification by this Court to make certain the precise scope of veterans' reemployment rights is great. The importance of a clear definition is apparent.

1. Although not dealing with vacation rights but with other conditions of employment which

depended upon length of service, this Court made clear in its very recent decision in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, that the restored veteran's job rights upon reemployment under the Selective Training and Service Act of 1940 were to be measured by the rights he would have enjoyed had he remained continuously in his civilian employment during the period of his military service. In the instant case the veteran would have had at least five years of continuous employment had he remained on his civilian job and, consequently, would unquestionably have been entitled to two weeks' vacation with pay. The failure of the court below to hold him entitled to this status upon his reemployment constitutes an obvious departure from the rule established by this Court.

There is no ambiguity in the test to be applied. Citing its earlier opinions to the same effect, this Court no less than six times in the *Oakley* opinion reiterated the applicable standard in terms peculiarly pertinent to the facts of this case. The opinion refers to the "Act's treatment of him [the veteran] as though he had remained continuously in his civilian employment" (p. 279), to "his right to the seniority in the restored position which he would have had if he had remained continuously in his civilian employment" (p. 282), to his right to be restored "to a position which, on the moving escalator of terms and conditions affecting that particular employment,

would be comparable to the position which he would have held if he had remained continuously in his civilian employment" (p. 283), and to "the veteran's right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment" (p. 284). The decision specifically holds that the veteran "assumes, upon his reemployment, the seniority he would have had if he had remained in his civilian employment" (p. 284), and that the expiration of a year "did not terminate the right of the veteran to the seniority to which he was * * * entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment" (p. 285).

It is thus apparent that the wording of the Court's interpretation of the statutory requirement was deliberate. Since its application in the instant case would have established the veteran's right to the status he sought, it was clear error for the court below to deny him this status. The distinction attempted by the court below that vacation rights were not based upon seniority is wholly without merit. Seniority, or length of service, has no independent significance, but has meaning only as it confers substantive benefits in various aspects of the employment. But whether or not vacation rights be deemed an incident of seniority, the statutory protection is applicable whenever a job right, as here, is based upon length

of service alone. See *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275; *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521; *Trailmobile Co.* v. *Whirls*, 331 U. S. 40.

2. The decision below is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Mentzel* v. *Diamond*, 167 F. 2d 299. In that case, as here, a restored veteran was awarded one week's vacation with pay under a collective bargaining agreement negotiated while he was in the Army. As in the instant case, that contract provided for one week's vacation after one year's service and two weeks' vacation after five years of service. If the veteran were permitted to count his military service he would have been entitled to two weeks' vacation. Reaching an opposite conclusion from the court below, the Court of Appeals for the Third Circuit held that "the veteran is to be treated, so far as benefits under the Act are concerned, as though he had worked every day at the plant" and that "he is entitled to whatever vacation rights would have accrued to him had he not shouldered a gun and gone off to war" (p. 301). Cf. *MacLaughlin* v. *Union Switch & Signal Co.*, 166 F. 2d 46 (C. A. 3). But cf. *Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463 (C. A. 2); *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (C. A. 2); *Dougherty* v. *General Motors Corporation*, 176 F. 2d 561 (C. A. 3). Review of the decision below is necessary to resolve the conflicting views of the courts of appeals

with respect to the vacation rights of restored veterans.

3. The question presented is important both because of the need for an authoritative decision on vacation rights and because of the clarification such a decision will impart to related questions under the Selective Training and Service Act. We are advised by the Department of Labor that some 350,000 veterans of World War II have potential vacation pay claims under contracts comparable to that in the instant case. Moreover, the issue will undoubtedly arise under the comparable provisions of Section 9 of the Selective Service Act of 1948, recently continued in force by the Selective Service Extension Act of 1950, P. L. 599, 81st Cong., 2d sess.

Of more general importance is the effect to be given the "furlough or leave of absence" and "other benefits" clauses of Section 8 (c) upon which the court below relied in denying the veteran's claim in the present case. These provisions have played an important part not only in the interpretation of vacation rights (see decisions cited under 2) but also in the determination of the reemployed veteran's rights with respect to other incidents of the employment, such as severance pay, promotion, and others. See, *e. g.*, *Seattle Star, Inc.* v. *Randolph,* 168 F. 2d 274 (C. A. 9); *Feore* v. *North Shore Bus Co.,* 161 F. 2d 552 (C. A. 2); *Raulins* v. *Memphis Union Station Co.,* 168 F. 2d 466 (C. A. 6). Considerable con-

fusion has resulted in many areas from attempts to reconcile these provisions with the seniority and other provisions of Section 8. The importance of settling this confusion and clearly defining the scope of veterans' reemployment rights at this time is apparent.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950

FILED
OCT 25 1950
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 278.

ROY BROWN,
Petitioner,

v.

WATT CAR & WHEEL CO.

BRIEF OF RESPONDENT IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

RAYMOND D. METZNER,
1940 E. Sixth Street,
Cleveland, Ohio,
Attorney for Respondent.

PARKER FULTON,
Co-Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-6547

INDEX.

Opinions Below 1

Jurisdiction 1

Counter-Statement of Questions Involved 2

Statement 2

Argument Opposing Granting of Writ 3

1. The Decision of the Sixth Circuit Court of Appeals Is Not in Conflict With the Opinion of the Court of Appeals for the Third Circuit 3

2. The Decision of the Court of Appeals Is Not in Conflict With the Decisions of the Supreme Court 4

3. There Is No Confusion as to the Interpretation of the Selective Training and Service Act of 1940 5

4. The Instant Case Is Not of Great Continuing Importance 5

Conclusion 6

TABLE OF AUTHORITIES.

Cases.

Aero-Nautical Industrial Lodge v. Campbell, 337 U. S. 521 5

Cushnier v. Ford Motor Company, 89 Fed. Supp. 491 4

Dougherty v. General Motors Corp., 176 Fed. (2d) 561 (C. A. 3, 1949) 3, 4

Dwyer v. Crosby, 167 Fed. (2d) 567 4

Fishgold v. Sullivan Drydock & Repair Co., 328 U. S. 275 5

Mentzel v. Diamond, d.b.a. Elizabeth Iron Works, 167 Fed. (2d) 299 (C. A. 3, 1948) 3, 4

Nevins v. Curtiss-Wright Corp., 172 Fed. (2d) 535 (C. A. 6, 1949) 5

Oakley v. Louisville & N. R. Co., 338 U. S. 278 4

Seattle Star, Inc. v. Randolph, 168 Fed. (2d) 274 (C. A. 9) 4

Siaskiewicz v. General Electric Co., 166 Fed. (2d) 463 4

Statutes.

Selective Training and Service Act of 1940:

Section 8 (b) B 3

Section 8 (c) 2, 3, 5

Selective Training and Service Act of 1948 5

50 U. S. C. App. 308 2

In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 278.

ROY BROWN,
Petitioner.

v.

WATT CAR & WHEEL CO.

BRIEF OF RESPONDENT IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

Your Respondent, The Watt Car & Wheel Co., respectfully opposes the petition of the Solicitor General in the above entitled cause, and, in support of its opposition, submits the following brief.

OPINIONS BELOW.

The District Court of the Southern District of Ohio, Eastern Division, wrote a Memorandum Opinion (R. 17), with findings of fact and conclusions of law, and entered judgment accordingly in favor of the Respondent (R. 19).

The Court of Appeals for the Sixth Circuit affirmed the judgment. Its opinion is reported at 182 F. 2d 570, and is set forth in full at page 23 of the Record herein.

JURISDICTION.

The judgment of the Court of Appeals (R. 23) was entered on June 1, 1950. The petition for a writ of certiorari was filed on August 29, 1950. The jurisdiction of the Court is invoked under 28 U. S. C. 1254 (1).

COUNTER-STATEMENT OF QUESTIONS INVOLVED.

1. On the basis of the Agreed Statement of Facts, where the vacation rights have been established by contract between the employer and the collective bargaining agent *since* the induction into the Army of the petitioning employee (there being no vacation rights at the time of his induction, R. 5), and the employer has treated the Petitioner in accordance with the contracting parties' interpretation of their contract, and in the same manner as non-veteran employees on furlough or leave, is the Petitioner entitled to greater rights by reason of 50 U. S. C. App. 308?

2. Do vacation rights come within the purview of Section 8 (c) of the Selective Training and Service Act of 1940, and does that section of the Statute mean what it says?

STATEMENT.

The statement of the Petitioner is not entirely correct. It states that the restored veteran claimed to be entitled to two weeks instead of the one week vacation pay allowed him "by virtue of a collective bargaining agreement," but fails to point out the following Agreed Facts (R. 6):

> "6. That, under the foregoing provisions of the contract the Company and the signatory union have followed the practice of handling veterans' vacations in the manner in which plaintiff has been treated." (Interpretation by the parties.)

Also the following Agreed Facts (R. 5):

> "2. That on or about December 10, 1945, the plaintiff was honorably discharged; that he applied for reemployment; that defendant *restored him to his former position with the pay and seniority of said position* on January 4, 1946." (Italics added.)
>
> "4. That, at the time of plaintiff's induction into the U. S. Army, in 1942, the employees of the defendant were not entitled to any vacation with pay, nor was there any two weeks vacation with pay until the union contract in 1945."

The Petitioner's statement does set forth the Agreed Fact that non-veterans on furlough or leave of absence are not permitted, by the rules and practices of the employer, to count such time toward the five years continuous employment required in order to be eligible for two weeks vacation with pay.

On page 5 of his brief Petitioner erroneously makes the statement that the contract provisions quoted by the Court of Appeals (R. 24) made vacations depend solely on length of service. This, of course, is merely his argument, which is refuted by the Court of Appeals (R. 25-26) and by the interpretation of the parties to the contract by their conduct and practice.

The Court of Appeals held that the Appellee (Respondent) has fully complied with the Act by restoring Petitioner to his position as required by Sec. 8 (b) B and by conforming to Sec. 8 (c) without discrimination. (R. 25-26.)

ARGUMENT OPPOSING GRANTING OF WRIT.

There is no substantial basis upon which to grant the writ sought in this case.

1. The Decision of the Sixth Circuit Court of Appeals Is Not in Conflict With the Opinion of the Court of Appeals for the Third Circuit.

The Petitioner refers to the case of *Mentzel v. Diamond, d.b.a. Elizabeth Iron Works,* 167 Fed. (2d) 299 (C. A. 3, 1948) as being in conflict with the instant case. But it is quite apparent (aside from difference in the facts) that the Third Circuit Court of Appeals abandoned its conclusion in the *Mentzel* case when it decided *Dougherty v. General Motors Corp.,* 176 Fed. (2d) 561 (C. A. 3, 1949). Without any reference to its previous decision the Court held that a veteran was not entitled to vacation pay for the year of his return from the service, on the ground that the new collective bargaining contract was not discriminatory but

applied to veterans and non-veterans alike. The Court cited with approval the decisions of the Court of Appeals for the Second Circuit, thus bringing itself into line with all other Courts of Appeals and District Courts which have had the subject before them. *Siaskiewicz v. General Electric Co.*, 166 Fed. (2d) 463; *Dwyer v. Crosby*, 167 Fed. (2d) 567; *Seattle Star, Inc. v. Randolph*, 168 Fed. (2d) 274 (C. A. 9). The Court rejected the argument that the veteran would have been working the year before if he had not been in the Army. The *Dougherty* case was denied certiorari by this Court February 13, 1950.

The decision in the *Mentzel* case, since abandoned by the Third Circuit, can be accounted for in the following manner: (1) there was no showing of the treatment accorded non-veteran employees on leave, therefore no test of application of the contract provision. This distinction was pointed out by the District Court for the Eastern District of Michigan, Southern Division, in the case of *Cushnier v. Ford Motor Company*, 89 Fed. Supp. 491; (2) the decision was practically *ex parte*. The defendant had abandoned his case for lack of funds and no brief was filed. No counsel appeared for him, whereas both the Union and the U. S. Attorney appeared for the plaintiff. The Court was left without sufficient evidence and assistance of counsel.

2. The Decision of the Court of Appeals Is Not in Conflict With the Decisions of the Supreme Court.

Counsel will not presume to explain to this Court its own recent decisions. However, it seems clear that *Oakley v. Louisville & N. R. Co.*, 338 U. S. 278, involves simply a veteran employee's seniority status. No question of seniority is involved in the instant case and the Court of Appeals disposes of the point very clearly in its opinion (R. 25-26). See also *Siaskiewicz v. General Electric Co.*, 166 Fed. (2d) 463 (C. A. 2). Indeed the Agreed Statement of Facts stipulates "that defendant restored him to his

former position with the pay and *seniority* of said position * * *" (R. 5). (Italics added.)

In *Aero-Nautical Industrial Lodge v. Campbell,* 337 U. S. 521, Justice Frankfurter says that the Act gives the veteran the status of one who has been on furlough or leave of absence, but he is not to be favored as such against his fellows; that "this is the essence of our decision in *Fishgold v. Sullivan Drydock & Repair Co.,* 328 U. S. 275."

3. There Is No Confusion as to the Interpretation of the Selective Training and Service Act of 1940.

It seems to be very well established that the Act clearly preserves seniority rights as same are understood in collective bargaining. As to insurance, vacations and other benefits which are not usually regarded as part of the seniority status, Congress has given us Section 8 (c) as a guide. Indeed the Solicitor of the Department of Labor, as late as 1947, stated categorically that vacation rights came under Section 8 (c), and that time in the service need not be counted toward ascertaining vacation rights. Opinion Letter July 15, 1947. This opinion seems to be unanimous except for the Solicitor General's Office.

4. The Instant Case Is Not of Great Continuing Importance.

The Selective Service and Training Act of 1940 has been superseded by the Act of 1948. Whether or not the wording of the new Act will effect a different interpretation of Congressional intent is not here involved. The U. S. Attorney raised the point in *Nevins v. Curtiss-Wright Corp.,* 172 Fed. (2d) 535 (C. A. 6, 1949), but the Court held that the case was governed by the 1940 Act. It would seem that this reduces the importance of the instant case, as all men now in the armed service will come under the 1948 act as extended.

CONCLUSION.

On the basis of the particular facts in this case and the reasons stated, and because of the unanimity of the opinions of all the lower courts which have considered the issue herein, we respectfully submit that the petition for a writ of certiorari should be dismissed.

RAYMOND D. METZNER,
Attorney for Respondent.
PARKER FULTON,
Co-Counsel.